No. 76-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

DONALD B. ROSS,

Petitioner,

v.

RICHARD MORALES,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Court of Appeals' opinion is reported at 541 F.2d 233. Its text appears at Petitioner's Appendix A-1 to A-7. The opinion of the United States District Court For The Northern District of Oklahoma is not officially reported but is reported unofficially at 1976 CCH Fed. Sec. L. Rep. ¶ 95,704. Its text appears at Petitioner's Appendix A-8 to A-20.

JURISDICTION

The interlocutory judgment of the Court of Appeals with respect to liability only was entered on August 27, 1976. The petition for a writ of *certiorari* was filed on November 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Tenth Circuit was correct in finding, through application of both the so-called "mechanical" and "pragmatic" tests of liability under § 16(b) of the Securities Exchange Act of 1934, 28 U.S.C. § 78p(b) [the "Act"], that voluntary exercises of warrants to purchase stock by a corporate insider followed or preceded within six months by sales of the resulting stock give rise to liability under the Act.

2. Whether cause exists for interlocutory review by way of *certiorari* of the finding of liability by the Court of Appeals for the Tenth Circuit prior to completion of District Court proceedings with respect to damages, entry of final judgment and appellate review thereof.

STATUTE INVOLVED

Section 16(b) of the Securities Exchange Act of 1934, as amended, 28 U.S.C. § 78p(b), provides in part:

> (b) . . . any profit realized by [any beneficial owner, director or officer] from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director or officer . . . .

STATEMENT OF THE CASE

Petitioner, while Financial Vice President of MAPCO, Inc., exercised warrants to purchase 3416 shares of MAPCO, Inc. common stock by surrendering such warrants together with the required exercise price; and within six months

before or after such warrant exercises, he sold 900 shares of such stock. Respondent filed suit as a shareholder to recover the profits realized in these transactions for the benefit of MAPCO, Inc. after the management of MAPCO, Inc. had declined to enforce the rights of the company against one of its members.

The District Court misconstrued the statutory language of Section 16(b), *supra,* reading it to require a demonstration of the existence of an actual abuse of inside information (Petitioner's Appendix A-8), and upon determining that such demonstration had not been made and that a warrant which required a substantial cash payment to be exercised was "the economic equivalent" of the stock issuable upon exercise, found for the Defendant-Petitioner.

The Court of Appeals for the Tenth Circuit reversed, finding from the facts in the record ample *opportunity* and *possibility* for speculative abuse (as opposed to its proven actuality); and further finding that a warrant which carries a right to purchase common stock at a favored price cannot be deemed the economic equivalent of the common stock issuable upon exercise and payment. (Petitioner's Appendix A-7).

ARGUMENT

1. The petition calls upon the Court to apply settled principles governing Section 16(b) to the facts of this case. This the Court of Appeals has already done and so narrow a question warrants no further review.

2. The decision of the Court of Appeals for the Tenth Circuit is not in conflict with governing authority in any other Circuit. Exercises of warrants or options by persons having the potential for access to inside information, where

the timing of such exercises is within their control, are universally regarded as purchases of the securities issuable upon exercise. See *Shaw* v. *Dreyfus*, 172 F.2d 140, 142 (2d Cir. 1949), *cert. den.*, 337 U.S. 907; *Clamitz* v. *Thatcher Manufacturing Co.*, 158 F.2d 687, 692 (2d Cir. 1947), *cert. den.*, 331 U.S. 825, (dictum); *MacDonald* v. *Commissioner*, 230 F.2d 534, 540 (7th Cir. 1956); *Walet* v. *Jefferson Lake Sulphur Co.*, 202 F.2d 433 (5th Cir. 1953), *cert. den.*, 346 U.S. 820, Securities Act Release 4509 (1950), Loss, *Securities Regulation*, 1076, 1079.

The Court of Appeals distinguished, upon the facts, the purported conflicts raised by *Ferraiolo* v. *Newman*, 259 F.2d 342 (6th Cir. 1958) *cert. den.*, 359 U.S. 927 (1959) (Petitioner's Appendix A-4 and A-5); and by *Petteys* v. *Butler*, 367 F.2d 528 (8th Cir. 1966) *cert. den.*, 385 U.S. 1006 (1967) (Petitioner's Appendix A-5). It applied to the facts before it both the mechanical or objective test and the pragmatic test of liability (Petitioner's Appendix A-4 to A-7).

3. Petitioner's application for *certiorari* is premature in that it seeks interlocutory review of the Court of Appeals' finding of liability prior to completion of District Court proceedings with respect to assessment of damages, entry of final judgment and appellate review of that final judgment. The Petitioner betrays no awareness of the extraordinary nature of his request. No compelling fact or argument in support of so radical a departure from normal procedure has been advanced by Petitioner. Respondent knows of the existence of none.

CONCLUSION

No conflict among the Circuits is here presented. The only issues advanced in the Petition relate to narrow application of settled principles to facts in the record. No final judgment has been rendered or subjected to appellate review. The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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December, 1976